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Supreme Court, U.S.
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No. 97-548

In The

Supreme Court of the United States

October Term, 1997

SHERI L. BROWN,

Petitioner,

v.

PIZZA HUT OF AMERICA, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Pizza Hut of America, Inc. is a wholly owned subsidiary of Pepsico, Inc.

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STATEMENT OF THE CASE

Petitioner and Respondent each filed appeals of the district court's award of liquidated damages in this Fair Labor Standards Act (FLSA) unpaid wages and retaliation action. Petitioner appealed the district court's refusal to liquidate the jury's award of $15,605.83 in front pay and compensatory damages for retaliation. Respondent appealed the district court's liquidation of the jury's retaliatory discharge related award of back pay of $34,394.17. Appendix to Brief in Opposition A1-A6 (May 22, 1997 Order and Judgment). The trial court also liquidated the jury's award of $2,500 in unpaid wages. Appendix to Brief in Opposition B1-B3 (June 20, 1996 Memorandum Opinion). The trial court subsequently awarded Petitioner trial court related attorney's fees of $24,387.00. Appendix to Brief in Opposition C1-C2 (January 27, 1997 Order). The jury awarded a total of $52,500.00 in unpaid wages, back pay, front pay, and non-pecuniary compensatory damages. Appendix to Brief in

Opposition D1-D2 (May 17, 1997 Verdict Form). Petitioner received a total of $113,781.17, plus recoverable interest and costs.

The Tenth Circuit denied both appeals on May 22, 1997. Appendix to Brief in Opposition at A1-A6 (May 22, 1997 Order and Judgment). Petitioner subsequently applied for appeal-related attorney's fees. In its Order denying Petitioner's request for appeal-related attorney's fees, the Tenth Circuit found Respondent's appeal reasonable and noted Petitioner did not prevail on her cross-appeal. The circuit court held that appeal-related attorney's fees in FLSA cases are discretionary. Appendix to Brief in Opposition E1-E3 (June 26, 1997 Order).

Petitioner now seeks a writ of certiorari, asserting the existence of a conflict among circuit courts which does not exist. Petitioner has also failed to establish that the resolution of the issue presented is of compelling public importance.

A. Petitioner Has Mischaracterized the Tenth Circuit's June 26, 1997 Order

In her report of the Tenth Circuit's June 26, 1997, opinion denying appeal-related fees, Petitioner inaccurately states the circuit court found a split of authority on the issue of "whether to award appeal-related attorney's fees in a Fair Labor Standards Act (FLSA) case. . . . " The circuit court's opinion described a split of authority among the courts interpreting the *second sentence* of 29 U.S.C.A. § 216(b). The second sentence of 216(b) describes the damages recoverable in FLSA retaliation cases. This section does not provide for the award of attorney's fees

until the fifth sentence. The Tenth Circuit did not recognize a split of authority regarding the issue of whether 216(b) appeal-related attorney's fees are discretionary or mandatory.

REASONS TO DENY CERTIORARI

Petitioner contends this Court should grant a writ of certiorari to resolve an asserted conflict among the Circuit Courts of Appeals regarding the issue of whether Section 216(b) of the FLSA mandates the award of appeal-related attorney's fees or makes such an award discretionary.[1] A conflict between circuit courts on the same important matter is considered when this Court decides whether to exercise its discretion to review on certiorari. Rule 10, Rules of the Supreme Court. However, certiorari should be granted only in those cases involving issues of importance to the public and in cases where there is a real and embarrassing conflict of opinion and authority between circuits. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1955); *Layne and Bowler Corp. v. Western Well Works*, 261 U.S. 387, 43 S. Ct. 422, 67 L. Ed. 712 (1923). Petitioner's application does not satisfy these stringent requirements.

Petitioner asserts a conflict exists among the Fifth, Eighth, Tenth and Eleventh Circuits, which have held Section 216(b) provides for the discretionary award of

[1] Petitioner does not claim the circuit court abused it's discretion or that Respondent filed a frivolous, unreasonable or bad faith appeal.

appeal-related attorney's fees, *Montalvo v. Tower Life Building*, 426 F.2d 1135 (5th Cir. 1970); *O'Donnell v. Georgia Osteopathic Hospital, Inc.*, 748 F.2d 1543 (11th Cir. 1984); *Cleverly v. Western Electric Co.*, 594 F.2d 638 (8th Cir. 1979); *International Assoc. of Fire Fighters, Local 2203 v. West Adams County Fire Protection District*, 877 F.2d 814 (10th Cir. 1989), and the Fourth, Sixth, Seventh and Ninth Circuits, which Petitioner erroneously claims have ruled appeal-related fees are mandatory under Section 216(b). In support of her contention that a conflict exists, Petitioner cites *Maddrix v. Dize*, 153 F.2d 274 (4th Cir. 1946); *Fegley v. Higgins*, 19 F.3d 1126 (6th Cir. 1994); *Soto v. Adams Elevator Equipment Co.*, 941 F.2d 543 (7th Cir. 1971); and *Bratt v. County of Los Angeles*, 912 F.2d 1066 (9th Cir. 1990). Petitioner has mischaracterized and overstated the holdings in each of these cases.

In *Fegley*, supra, the Sixth Circuit affirmed in part and reversed in part the trial court in an FLSA case. The Court's direction regarding the issue of appeal-related attorney's fees makes it plain the Court considered the award of such fees discretionary. The Court specifically left it to the district court's *discretion* as to whether to increase the previous award of trial-related attorney's fees since additional effort had been expended on appeal. *Fegley*, p. 1135.

Petitioner has also mischaracterized the position of the Ninth Circuit on this issue. In *Bratt*, supra, the Ninth Circuit awarded the prevailing employee a reasonable attorney's fee incurred in defending against the employer's cross-appeal in an FLSA case, but did not discuss the issue of whether such an award is mandatory or discretionary. The Court, in making the award, cited a

previous Ninth Circuit case, *Newhouse v. Robert's Ilima Tours, Inc.*, 708 F.2d 436 (9th Cir. 1983). In *Newhouse*, at page 441, the Court held that reasonable attorney's fees in FLSA cases *may* include fees for appellate and post-remand services, citing generally *Perkins v. Standard Oil Co.*, 399 U.S. 222, 90 S. Ct. 1989, 26 L. Ed. 2d 533 (1970) and *Suzuki v. Yuen*, 678 F.2d 761 (9th Cir. 1982). Accordingly, the Ninth Circuit has concluded appeal-related attorney's fees in FLSA cases are discretionary.

Petitioner overstates the holding in the Seventh Circuit case *Soto v. Adams*, supra. While the Court directed the prevailing employee to submit a statement of appeal-related attorney's fees, it did not discuss the issue of whether such an award is discretionary or mandatory under Section 216(b). The Court simply cited *Ustrak v. Fairman*, 851 F.2d 983 (7th Cir. 1988). *Ustrak* was not an FLSA case and the Court did not interpret the attorney's fee provision of Section 216(b). A prisoner brought a civil rights case against a warden and the Court found in such a case that a successful plaintiff would *ordinarily* be entitled to reimbursement of attorney-related fees.

Petitioner also misplaces her reliance on the Fourth Circuit case of *Maddrix v. Dize*, supra. While the Court in *Maddrix* resolved the issue of whether the district court had the power under Section 216(b) to award appeal-related fees applied for after the issuance of a Supreme Court mandate in the employee's favor, the Court did not have before it the issue of whether such an award is mandatory or discretionary. The Court noted " . . . while the allowance of an additional fee for appellate work *may* not be beyond the authority of the appellate court, the Act does not forbid the District Court to award such

additional compensation in case the appellate courts have not been asked and have not undertaken to do so." (Emphasis added.) The district court had concluded that it did not have the power under Section 216(b) to award appeal-related attorney's fees requested after issuance of the Supreme Court mandate.

Petitioner has quoted *Fegley*, supra, extensively regarding the mandatory nature of attorney's fees in FLSA cases and the purpose of attorney's fees in FLSA cases. This language has been quoted out of context in that the Court was discussing the award of reasonable trial level attorney's fees under the FLSA. However, when the *Fegley* Court addressed the issue of appeal-related fees, it clearly considered the award of such fees discretionary. *Fegley* at p. 1135.

Perkins v. Standard Oil Company, 399 U.S. 222, 90 S. Ct. 1889, 26 L. Ed. 2d 544 (1970), also relied upon by Petitioner, is inapposite. The district court in that case held that Section 4 of the Clayton Act did not authorize the award of appeal-related attorney's fees in a successfully prosecuted private anti-trust action and that the Supreme Court's mandate precluded the award of appeal-related fees for services performed in connection with the litigation in the Supreme Court. This Court ruled that Section 4 of the Clayton Act does authorize the award of appeal-related attorney's fees and noted that its failure to make explicit mention in the mandate of attorney's fees left the matter open for *consideration* by the district court.

Even if a real and embarrassing conflict of opinion existed among the circuits, Petitioner has not raised an issue the resolution of which is of compelling importance

to the public, warranting the grant of a writ of certiorari. The purpose of statutory construction is to effectuate the purpose of Congress in enacting legislation. This Court has recognized that in some cases the statutory use of "shall" can be interpreted as granting the discretion to act in accomplishing the purposes of a statute. *Hecht Co. v. Bowles*, 821 U.S. 321, 64 S. Ct. 587, 88 L. Ed. 754 (1944). The resolution of whether the attorney's fee provision of Section 216(b) makes appeal-related attorney's fees mandatory or discretionary is not of compelling importance in effectuating the purposes of the FLSA.

The remedial provisions of the FLSA in retaliation cases provide for all-encompassing compensation.[2] Employees can recover any legal or equitable relief appropriate to effectuate the purposes of Section 215(a)(3), including employment, reinstatement, promotion, back and front pay, and liquidated damages. 29 U.S.C.A. § 216(b). The Court also has the power to award attorney's fees to successful FLSA claimants. Given the broad scope of the damages recoverable by employees making FLSA retaliation claims, it is not of imperative importance to the public to resolve the issue of whether appeal-related attorney's fees are discretionary or mandatory in such cases. The mandatory award of such fees in every case is not necessary for the purposes of the statute to be satisfied.

Respondent's case is a good example. The trial court's damages instruction allowed the jury to compensate Petitioner for all of her economic loss sustained,

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[2] Neither party appealed the judgment for unpaid wages.

including back pay and front pay, as well as for broad non-pecuniary loss including future losses, emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life. Appendix to Brief in Opposition F1-F3 (Trial Court's Instruction No. 21). This instruction provided for complete compensation for any loss sustained by Petitioner as a result of violation of the FLSA.

The jury found Petitioner had been damaged in the total amount of $52,500.00. In addition to this amount, which completely compensated Petitioner for all loss, Petitioner received an additional sum of $36,894.17 in liquidated damages and $24,387.00 in trial court related attorney's fees. Given the generous and comprehensive nature of Petitioner's total recovery, which far exceeded her actual damages as found by the jury, a mandatory award of appeal-related attorney's fees, when Respondent's appeal was reasonable and Petitioner filed her own unsuccessful appeal, was not necessary to give effect to the remedial provisions of the FLSA proscription of retaliation.

The FLSA's broad remedies are available to all employees bringing such claims, as well as actions under the Age Discrimination in Employment Act of 1967, 29 U.S.C.A. §§ 623-626(b) and the Equal Pay Act, 29 U.S.C.A. § 206(d)(1). The resolution of whether appeal-related fees are mandatory or discretionary is not of compelling public importance since properly exercised discretion on the question of appeal-related fees satisfies the remedial purpose of the FLSA.

CONCLUSION

When a Petitioner seeks certiorari on the ground of conflict of opinion between circuits, a writ should be granted only when a real and embarrassing conflict exists and the issue is one of compelling importance to the public. Petitioner's application satisfies neither of these requirements. No conflict on the issue presented exists. The Sixth Circuit and Ninth Circuit opinions cited by Petitioner as conflicting with the circuit courts holding that fees in appeal-related FLSA cases are discretionary hold that such fees are discretionary. The Fourth Circuit and Seventh Circuit simply have not addressed the issue.

The resolution of this issue is also not of significant importance to the public. Given the FLSA's generous remedial provisions, the mandatory award of appeal-related fees in every case is not necessary to effectuate the purposes of the FLSA, as evidenced in Petitioner's own case. Accordingly, Respondent respectfully requests that the Court deny Petitioner's application for writ of certiorari.

Dated November 10, 1997.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SHERI L. BROWN, Plaintiff-Appellee-Cross-Appellant, v. PIZZA HUT OF AMERICA INCORPORATED, Delaware corporation, Defendant-Appellant-Cross-Appellee.	)	Nos. 96-6244 & 96-6260 (D.C. No. CIV-95-1293-C) (W.D. Okla.)

ORDER AND JUDGMENT*

(Filed May 22, 1997)

Before BRORBY, BARRETT, and LUCERO, Circuit Judges.

Plaintiff, a former Pizza Hut restaurant manager, prevailed at trial on her claim under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219, that she was constructively discharged by defendant Pizza Hut in

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* At the parties' request, the case is unanimously ordered submitted without oral argument pursuant to the applicable rules. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

retaliation for complaining about its break policy and nonpayment of overtime compensation. The jury awarded Brown $2,500.00 in unpaid overtime; $34,394.17 in back pay; and a lump sum of $15,605.83 in compensatory damages. Under the jury instruction and verdict form, the compensatory damage award may have included front pay as well as damages for other, nonpecuniary losses. *See* Appellant's App. at 40-41, 50. At Brown's request, the district court awarded her an additional amount as liquidated damages equal to the jury's unpaid overtime and back pay awards under 29 U.S.C. § 216(b).

On appeal, Pizza Hut contends that the district court erred in doubling the back pay award on Brown's retaliation claim. Pizza Hut argues that the liquidated damages award improperly duplicates damages provided by the jury in its compensatory damages award. Brown contends on cross-appeal that the district court was required by the statute to *double* the jury's compensatory damages award as well as the back pay and overtime awards. We exercise jurisdiction under 28 U.S.C. § 1291, and affirm.

The parties do not agree on the appropriate standard of review. Pizza Hut argues that we should review the district court's interpretation of the statute de novo, while Brown argues that we should review the district court's award of liquidated damages only for abuse of discretion. We see no inconsistency in these contentions. Pizza Hut's claim that the district court wrongly interpreted 29 U.S.C. § 216(b) raises a legal issue that we review de novo. *See Burlington N.R.R. v. Huddleston*, 94 F.3d 1413, 1416 (10th Cir. 1996). To the extent a proper

interpretation of the statute gives the district court discretion, however, we review its action under the statute only for abuse of discretion. *See Crenshaw v. Quarles Drilling Corp.*, 798 F.2d 1345, 1351 (10th Cir. 1986). With these standards in mind, we turn to the merits.

The liquidated damages award provided in the first sentence of § 216(b)[1] – for violations of the FLSA's minimum wage and overtime compensation provisions – is intended to compensate the plaintiff for "damages too obscure and difficult of proof for estimate other than by liquidated damages." *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 583-84 (1942). The statutory language gives us no reason to conclude that the award of liquidated damages provided in the second sentence of § 216(b) – for violations of the FLSA's retaliation provision – is intended to serve a different purpose.

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[1] The first two sentences of 29 U.S.C. § 216(b) state:

> Any employer who violates the provisions of section 206 [minimum wages] or section 207 [overtime compensation] of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) [retaliatory discharge] of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages.

Whether the provision for an award of liquidated damages in retaliation cases is discretionary or mandatory is a separate question. Although we have held that the award of liquidated damages in wage and overtime cases provided in the first sentence of § 216(b) is mandatory unless the district court finds that the employer acted reasonably and in good faith, as provided in 29 U.S.C. § 260, *see, e.g., Crenshaw,* 798 F.2d at 1351 (case involving overtime provision of FLSA); *Doty v. Elias,* 733 F.2d 720, 725-26 (10th Cir. 1984) (case involving minimum wage provision of FLSA), we have not yet had occasion to consider whether the liquidated damages award provided in the *second* sentence of the statute – for violations of the FLSA's retaliatory conduct provision – is mandatory or discretionary. *Compare Blanton v. City of Murfreesboro,* 856 F.2d 731, 737 (6th Cir. 1988), *and York v. City of Wichita Falls,* 763 F.Supp. 876, 880 (N.D. Tex. 1990), *and Professional Firefighters Ass'n v. City of Clayton,* 759 F.Supp. 1408, 1413-14 (E.D. Mo. 1991), *with Avitia v. Metropolitan Club of Chicago, Inc.,* 49 F.3d 1219, 1226, 1232 (7th Cir. 1995), *and Lowe v. Southmark Corp.,* 998 F.2d 335, 337 (5th Cir. 1993). We need not determine this issue today. Whether mandatory or discretionary, the plain language of the second sentence of § 216(b) clearly implies that only "wages lost" are subject to doubling in a retaliation case. If the award of liquidated damages on Brown's back pay award (which obviously represents lost wages) is mandated by § 216(b), then Pizza Hut cannot show that the district court erred in making the award.

Even if the award is discretionary, the only compensatory damages that could arguably be improperly duplicated by the liquidated damages award on back pay are

those awarded for nonpecuniary losses, and Pizza Hut cannot show what portion of Brown's lump-sum compensatory damages award represents nonpecuniary losses. According to the jury instruction and the verdict form, Brown's compensatory damages award might include front pay and/or compensation for "future losses, emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life." Appellant's App. at 40, 50. Pizza Hut has not in any way indicated that it objected in the district court to both pecuniary and nonpecuniary damages being combined on the verdict form and, accordingly, it has waived any objection to the district court's treatment of this award. *Cf. Patton v. TIC United Corp.*, 77 F.3d 1235, 1241 (10th Cir.), *cert. denied*, 116 S.Ct. 2525 (1996); *Fortier v. Dona Anna Plaza Partners*, 747 F.2d 1324, 1337 (10th Cir. 1984); *Dixson v. Newsweek, Inc.*, 562 F.2d 626, 631 (10th Cir. 1977).

By the same token, Brown cannot prevail on her cross-appeal that § 216(b) mandates that her compensatory damages award be doubled. Although front pay at least arguably constitutes lost wages, Brown cannot show what portion of her lump-sum compensatory damages award represents front pay. There is no indication in the record that Brown objected to both pecuniary and nonpecuniary damages being combined on the verdict form and, as a result, she cannot show that the district court erred in declining to double her compensatory damages award.

AFFIRMED.

Entered for the Court

Carlos F. Lucero
Circuit Judge

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

SHERI L. BROWN, Plaintiff, vs. PIZZA HUT OF AMERICA, INC., Defendant.	)	No. CIV-95-1293-C (Filed Jun. 20, 1996)

MEMORANDUM OPINION

The trial of this matter was conducted May 13-17, 1996, and concluded with a jury verdict in favor of plaintiff on her Fair Labor Standards Act ("FLSA") claims and in favor of defendant on plaintiff's Title VII discrimination and retaliation claims. On plaintiff's retaliation claim under the FLSA, the jury awarded plaintiff damages in the amount of $34,394.17 for back pay and $15,605.83 in compensatory damages, including front pay. Plaintiff was also awarded $2,500 in lost wages on her claim for unpaid overtime. The issue of liquidated damages is still at issue and, pursuant to the Court's June 3, 1996 Order, both plaintiff and defendant have submitted briefing on the issue. Plaintiff contends she is entitled to liquidated damages of $52,500, equal in amount to the jury's total award of damages in the verdict. Defendant, on the other hand, contends that although plaintiff is entitled to $2,500 in liquidated damages on her claim for unpaid overtime compensation, plaintiff should not be awarded any liquidated damages on her retaliation claim because the jury's

verdict effectuates the purpose of the FLSA without an award of liquidated damages.

The FLSA, 29 U.S.C. § 216(b), provides:

> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages.

It is within the Court's discretion to deny an award of liquidated damages or reduce the amount of such an award when the defendant employer shows its conduct was in good faith and that it had reasonable grounds for believing its conduct was not a violation of the FLSA. 29 U.S.C. § 260; *Dept. of Labor v. City of Sapulpa, Oklahoma*, 30 F.3d 1285, 1289 (10th Cir. 1994).

Defendant does not dispute that plaintiff is entitled to liquidated damages in the amount of $2,500 on her claim for unpaid overtime under the FLSA. However, defendant argues liquidated damages should not be awarded on plaintiff's retaliation claim. The Court disagrees and finds liquidated damages are warranted, although not in the amount plaintiff seeks.

Liquidated damages under the FLSA are intended to be compensatory, not punitive, *See, e.g., Renfro v. City of Emporia, Kansas,* 948 F.2d 1529 (10th Cir. 1991) ("The purpose for the award of liquidated damages is 'the reality that the retention of a workman's pay may well result in damages too obscure and difficult for estimate other than by liquidated damages.' [Citation omitted.]"), *cert. dismissed,* 503 U.S. 915 (1992). The jury has awarded plaintiff back pay in the amount of $34,394.17, as well as compensatory damages, including front pay, in the amount of $15,605.83. The Court finds plaintiff is entitled to and will be fully compensated by a liquidated damages award of $34,394.17. The jury has determined that $15,605.83 is the amount of damages that will compensate plaintiff for all losses other than back pay that she has suffered as a result of defendant's retaliatory conduct. To double that amount would frustrate the purpose of liquidated damages under the FLSA by allowing plaintiff a double recovery. *See, e.g., Avitia v. Metropolitan Club of Chicago, Inc.,* 49 F.3d 1219, 1232 (7th Cir. 1995).

Judgment will therefore be entered in accordance with the jury's May 17, 1996 verdict and the foregoing.

IT IS SO ORDERED this 20 day of June, 1996

/s/ Robin J. Cauthron
ROBIN J. CAUTHRON
UNITED STATES
DISTRICT JUDGE

ENTERED IN JUDGEMENT DOCKET ON 6-20-96

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

SHERI L. BROWN, Plaintiff vs. PIZZA HUT OF AMERICA, INC., Defendant	)	No. CIV-95-1293-C (Filed Jan. 27, 1997)

ORDER

On October 15, 1996, the Court entered an Order directing plaintiff's counsel to resubmit her attorney fee request to comply with certain instructions. The request has now been resubmitted, with a reduction of certain specific entries, and an explanation of others. Defendant has again objected to the amount sought. The October 15 Order contained the Court's direction that counsel revise her request to separate her time for the successful FLSA claims from all other work performed on the case. The Court warned counsel that if she were unable to adequately separate her time, the Court would "simply reduce the award to account for the limited success." Order at 3, citing *Hensley v. Eckerhart*, 461 U.S. 424, 426-27 (1984). Counsel's revised submission, in addition to making relatively minor reductions directed in the October 15 Order, maintains that only 14.8 of her originally claimed 350 hours were attributable to the non-FLSA claims. As stated in the October 15 Order, it is apparent from the motions, evidence, and trial testimony that the FLSA claims were entirely separate and apart from the losing

claims and were, in fact, relatively minor. This is not the case which justifies a fee award on *all* hours because the winning and non-winning claims are interrelated. The FLSA was a small part of pretrial preparation and trial time, and, based either on adequate records or common sense and experience, counsel should be able to distinguish hours spent. Because counsel is unwilling or unable to distinguish between time spent on prevailing and non-prevailing claims, the Court will reduce the claimed fee by half, that being a generous estimate of the preparation and trial time devoted to the FLSA claims.

Counsel have agreed and the Court finds $150 an hour to be a reasonable hourly rate for plaintiff's counsel. The Court finds 162.58 hours to be the reasonable time spent in prosecution of the FLSA, as distinguished from all other, claims. Accordingly, the Court awards an attorney fee in the amount of $24,387 in favor of plaintiff and against the defendant.

IT IS SO ORDERED this 27 day of January, 1997.

/s/ Robin J. Cauthron
ROBIN J. CAUTHRON
UNITED STATES DISTRICT JUDGE

D-1

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

SHERI L. BROWN, Plaintiff	)	No. CIV-95-1293-C
vs.	)	**DOCKETED**
PIZZA HUT OF AMERICA, INC., Defendant	)	(Filed May 17, 1996)

VERDICT FORM

We the jury being duly empaneled and sworn upon our oaths, find as follows:

I.

(Complete each of Parts A through D)

(A) ON PLAINTIFF'S CLAIM FOR SEXUAL HARASSMENT, in favor of:

_ Plaintiff OR ✓ Defendant

(If you found for plaintiff, also complete Part IIA)

(B) ON PLAINTIFF'S TITLE VII RETALIATION CLAIM FOR COMPLAINING ABOUT SEXUAL HARASSMENT, in favor of:

_ Plaintiff OR ✓ Defendant

(If you found for plaintiff, also complete Part IIA)

(C) ON PLAINTIFF'S FAIR LABOR STANDARDS ACT RETALIATION CLAIM FOR COMPLAINING ABOUT UNPAID OVERTIME AND/OR LABOR VIOLATIONS, in favor of:

✓ Plaintiff OR _ Defendant

(If you found for plaintiff, also complete Part IIA)

(D) ON PLAINTIFF'S CLAIM FOR UNPAID OVERTIME IN VIOLATION OF THE FAIR LABOR STANDARDS ACT, in favor of:

✓ Plaintiff OR _ Defendant

(If you found for plaintiff, also complete Part IIB)

II.

DAMAGES

(A)

If you found in favor of plaintiff in parts I(A), (B), or (C) above, indicate below the damages to which plaintiff is entitled. If you found in favor of defendant on each of these three claims proceed to section II(B), below.

Back pay:	$34,394[17]
Compensatory damages: (including front pay)	$15,605[83]
Punitive damages: (only for Title VII claims)	$_____

(B)

If you found in favor of plaintiff in Part I(D) above, indicate below the amount of unpaid overtime wages to which plaintiff is entitled. If you found in favor of defendant on the Fair Labor Standard Act claim the presiding juror should now sign and date the verdict form.

Lost wages: $ 2,500^{00}

May 17, 1996
Date

/s/ Illegible
Presiding Juror

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SHERI L. BROWN, Plaintiff-Appellee-Cross-Appellant, v. PIZZA HUT OF AMERICA INCORPORATED, Delaware corporation, Defendant-Appellant-Cross-Appellee.	)	Nos. 96-6244 & 96-6260

ORDER
Filed June 26, 1997

Before BRORBY, BARRETT, and LUCERO, Circuit Judges.

We have before us plaintiff-appellee's "Application for Attorney Fees, Costs and Expenses and Motion for Remand to District Court to Determine Amount," and "Application to Tax Costs on Appeal and Application for Leave to Supplement." We construe plaintiff-appellee's application for fees, costs, and expenses as a timely cost bill. We GRANT her application for leave to supplement.

Whether to award appeal-related attorney's fees in a Federal Labor Standards Act (FLSA) case is within the court's discretion. *See International Ass'n of Fire Fighters,*

Local 2203 v. West Adams County Fire Protection Dist., 877 F.2d 814, 821 (10th Cir. 1989). We had not previously interpreted the language of the second sentence of 29 U.S.C. § 216(b), and found a split among the courts that have. Therefore, although defendant-appellant did not prevail on its issue on appeal, the appeal was reasonable. Plaintiff-appellee did not prevail on her cross-appeal. On balance, then, we do not believe an award of attorney's fees is warranted. *Cf. id.* at 822 (denying award of attorney's fees to prevailing party in reasonable appeal in FLSA case). Plaintiff-appellee's request for attorney's fees and motion to remand to district court is DENIED.

Plaintiff-appellee's request for costs in the amount of $289.17 for copies of the brief and appendix is GRANTED. The cost of a trial transcript is not taxable in this court. *See* Fed. R. App. P. 39(e). We note, moreover, that except for the verdict form and the jury instruction on damages, the trial transcript was not necessary to the appeal.

Entered for the Court
PATRICK FISHER, Clerk

By /s/ Opal A. Carter
Deputy Clerk

Instruction No. 21

MEASURE OF DAMAGES ON PLAINTIFF'S TITLE VII CLAIMS AND FAIR LABOR STANDARDS ACT RETALIATION CLAIM

If you find that the plaintiff has not proved her sexual harassment or retaliation claims by a preponderance of the evidence, your verdict on these claims should be for the defendant.

If, however, you find that the plaintiff has proved these claims by a preponderence of the evidence and that Pizza Hut is liable, then you must determine an amount of money that is fair compensation for her damages. You may award compensatory damages only for injuries plaintiff proves to you were caused by defendant's wrongful conduct. The damages that you award must be fair compensation, no more and no less.

On these claims you may award compensatory damages, based on the evidence introduced at trial, for future losses, emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life.

If you find plaintiff was constructively discharged, plaintiff may recover damages referred to as "back pay" and "front pay."

Back pay consists of wages and employee benefits plaintiff would have received from February 5, 1994, until the date of your verdict. From this amount you should subtract the total amount plaintiff has earned during the same period from other employment.

Front pay takes into consideration any continuing economic impact defendant's wrongful conduct has on

plaintiff. Front pay consists of the present value of the wages, benefits and advancements plaintiff would have earned from the date of your verdict until such date you determine plaintiff would have voluntarily left her employment with defendant or would have obtained other comparable employment.

In determining the amount of damages you decide to award, you must use sound discretion, drawing reasonable inferences from the evidence presented at trial. You may not award damages based on sympathy, speculation, or guesswork. On the other hand, the law does not require that plaintiff prove the amount of her losses with mathematical precision, but only with as much definiteness and accuracy as circumstances permit.